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Supreme Court, U.S.
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No. 90-_____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

ROBERT E. GIBSON,

Petitioner,

v.

THE FLORIDA BAR, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

- I. Do the procedural safeguards mandated by the first and fourteenth amendments to the United States Constitution for the exaction of bar dues required as a condition of the practice of law include:
 - A. pre-collection reduction of an objecting attorney's dues to that amount which the state bar expects to use for purposes it can constitutionally charge to him; and,
 - B. pre-collection disclosure of the portion of dues that will be used for constitutionally chargeable purposes, rather than merely post-collection notice of particular political and ideological positions taken by the bar?
- II. Does a requirement that an attorney object to particular political and ideological positions when taken by the bar, rather than state one general objection to any use of his compulsory bar dues for constitutionally objectionable purposes, violate the first and fourteenth amendments by denying him a fair opportunity to challenge the amount that he must pay?
- III. Is the burden of proof under this Court's applicable decisions impermissibly shifted from the bar to the objector when an attorney is denied a refund of the part of his compulsory dues spent for nonchargeable purposes in the past, because he did not present evidence as to that portion, even though his complaint states a valid cause of action challenging such expenditures and requests declaratory, injunctive, and "all other relief to which [he] appears to be entitled"?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the parties to the proceedings below included as respondents the Members of the Board of Governors of the Florida Bar, identified in the complaint as: Patrick G. Emmanuel, Thomas M. Ervin, Jr., David V. Kerns, Thomas W. Brown, John M. McNatt, Jr., Rutledge R. Liles, Robert E. Austin, Jr., F. Wallace Pope, Jr., Louie N. Adcock, Jr., William E. Loucks, Stephen A. Rappenecker, William Trickel, Jr., Dan H. Honeywell, Robert E. Pyle, Phyllis Shampanier, Theodore Klein, Barry R. Davidson, Stephen N. Zack, Alan T. Dimond, Robert E. Livingston, Michael Nachwalter, George A. Dietz, J. Fraser Himes, Barry A. Cohen, Rowlett W. Bryant, Joseph J. Reiter, Sidney A. Stubbs, Jr., Joe F. Miklas, Ray Ferrero, Jr., Harry G. Carratt, Drake M. Batchelder, Elting L. Storms, Ben L. Bryan, Jr., J. Dudley Goodlette, Edwin Marger, Neil J. Berman, and Edwin P. Krieger, Jr.; and in the Initial Brief of Appellant at ii in the court of appeals as: William H. Clark, Thomas M. Ervin, Jr., Crit Smith, S. Austin Peele, Joseph P. Milton, A. Hamilton Cooke, Robert E. Austin, Jr., James A. Baxter, Kenneth C. Deacon, Jr., William F. Blews, Horace Smith, Jr., Robert O. Stripling, Jr., John Edwin Fisher, Chandler R. Muller, David B. King, R. Kent Lilly, Patricia A. Seitz, Edward R. Blumberg, Sandy Karlan, Manuel A. Crespo, Michael Nachwalter, Alan T. Dimond, John W. Thornton, Jr., Robert M. Sondak, Stuart Z. Grossman, Joseph H. Serota, Daniel A. Carlton, Benjamin H. Hill III, Gary R. Trombley, Thomas M. Gonzalez, C. Douglas Brown, Patrick J. Casey, Arthur G. Wroble, H. Michael Easley, Joe F. Miklas, James Fox Miller, Roger H. Staley, Terrence Russell, Walter G. Campbell, Jr., Thomas G. Freeman, George H. Moss II, John A. Noland, William L. Guzzetti, Harry W. Dahl, Frederick J. Bosch, David W. Bianchi, Ladd H. Fassett, Wilhelmina L. Tribble, and Ruth Ann Bramson.

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**PETITION FOR A WRIT OF CERTIORARI TO THE
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FOR THE ELEVENTH CIRCUIT**

Petitioner Robert E. Gibson respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on July 23, 1990.

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals (Appendix ("App.") A, *infra*, 1a, 17a) are reported at 906 F.2d 624. There was no formal opinion of the United States District Court for the Northern District of Florida; its unreported final order is reproduced as Appendix B, *infra*, 22a. An opinion of the

court of appeals on an earlier appeal (App. C, *infra*, 24a) is reported at 798 F.2d 1564; the unreported decision of the district court reversed on that appeal is reprinted as Appendix D, *infra*, 35a.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1990. A timely petition for rehearing was denied on October 5, 1990 (App. E, *infra*, 43a). On November 26, 1990, Associate Justice Anthony M. Kennedy extended the time within which to file a petition for a writ of certiorari to and including January 17, 1991. Order (U.S. No. A-386). The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1) (West Supp. 1990).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The first amendment to the United States Constitution states in pertinent part: "Congress shall make no law * * * abridging the freedom of speech * * * or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Section 1 of the fourteenth amendment provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law." The Civil Rights Act of 1871, 42 U.S.C. § 1983 (1982), says in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * *, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Article V, § 15 of the Florida Constitution provides: "The supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted."

STATEMENT OF THE CASE

The Florida Supreme Court has dictated by rule that to practice law in Florida an individual must be a member in good standing of respondent Florida Bar ("the Bar"). The rules regulating the Bar also require that, to maintain good standing, members must pay annual dues on or before July 1 of each year. App. C at 25a; Fla. Stat. Ann., Rules Regulating Bar, Rule 1-3, -7.3 (West Supp. 1990). Petitioner Robert E. Gibson is a member in good standing. App. C at 26a.

The purposes defined by the Florida Supreme Court for the Bar are "to inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence." Fla. Stat. Ann., Rules Regulating Bar, Rule 1-2 (West Supp. 1990). One program for which the Bar uses dues is the taking and advocacy of positions on political and ideological issues, including ballot questions, through lobbying, publications, and speeches by Bar officials. App. C at 25a & n.1; App. D at 36a. When the Bar announced opposition to a ballot question actively supported by Mr. Gibson that would have limited state revenues, he brought this action under 42 U.S.C. § 1983. App. C at 26a; App. D at 35a.

The complaint alleges that the Bar's general practice of funding political advocacy with dues violates Mr. Gibson's first-amendment rights of free speech and association. App. A at 1a-2a.¹ Federal jurisdiction is based on 28 U.S.C. §§ 1331 and 1343(3) (1982). App. D at 35a. The complaint requests

¹ In addition to the Bar, the members of its Board of Governors are named as defendants. App. A at 1a.

declaratory, injunctive and "all other relief to which Plaintiff appears to be entitled." Dist. Ct. Record ("R.") 2 at 4, 10-11.

After a bench trial, the district court entered judgment for the Bar. App. C at 26a; App. D at 35a-42a. The court held that the "intrusion into plaintiff's rights occasioned by the Bar's legislative program" is justified by the state's interests in improving the administration of justice and advancing the science of jurisprudence and is sufficiently closely drawn, because of the Bar's policy that its Board of Governors must determine that legislation to be supported or opposed is related to those purposes. App. D at 41a.

The court of appeals reversed on appeal. It ruled that, because first-amendment rights are at stake, it was insufficient to rely on the existence of the policy and procedures by which the Bar took political and ideological positions. Rather, the court held, the Bar has the burden of proving that the actual past positions taken by it "were sufficiently related to its purpose of improving the administration of justice," *i.e.*, that they "relate directly" to "the role of the lawyer in the judicial system and in society." App. C at 32a-33a. The action was remanded for further proceedings consistent with the court of appeals' opinion. *Id.* at 34a.

On remand, the Bar amended its policy to include a procedure by which members objecting to legislative positions could obtain post-collection refunds of part of their dues. It then moved for "judgment on the mandate" on the ground that its procedure satisfies the requirements set out in *Teachers Local 1 v. Hudson*, 475 U.S. 292 (1986). The district court held proceedings in abeyance until the procedure was incorporated in a bylaw amendment and approved by the Florida Supreme Court. That approval was given in *Florida Bar Re Amendment to Rule 2-9.3 (Legislative Policies)*, 526 So. 2d 688 (Fla. 1988). In response, Mr. Gibson moved to enjoin implementation of the amended bylaw and contended that he was entitled to damages for past unconstitutional use of his dues. App. A at 5a-7a; R. 40 at 5; R. 46 at 11; R. 56 at 13.

Under the amended bylaw, when the Bar adopts a legislative position, it publishes notice of that action in the next issue of the twice-monthly *Florida Bar News*. A member has forty-five days from the notice's publication to "file with the executive director a written objection to a particular position on a legislative issue." The bylaw specifies that failure to object within that period "shall constitute a waiver of any right to object to the particular legislative issue." After an objection is received, the Bar's executive director determines and puts in escrow the pro rata amount of the objector's dues placed in dispute by his objection pending determination of its merits. The Board of Governors then has forty-five days to decide whether to refund that amount or refer the objection to binding arbitration as to "whether the legislative matters at issue are constitutionally appropriate for funding from mandatory Florida Bar dues" or must be subject to a refund, with interest. App. A at 6a n.8, 8a-9a.

After hearing argument on Mr. Gibson's motion for injunctive relief, the district court entered a final order denying his motion and dismissing the action on the ground that the amended bylaw "meets the safeguards and requirements necessary for protection of members' first amendment rights." App. B at 22a-23a. Mr. Gibson again appealed. This appeal challenges the constitutionality of the Bar's amended bylaw and the district court's failure to order a refund of the part of his dues spent for objectionable purposes in the past. App. A at 8a-9a & n.11.

The court of appeals affirmed in substantial part, holding that the amended bylaw is constitutional, in all but one minor respect, and that Mr. Gibson is not entitled to retroactive damages. *Id.* at 9a n.11, 13a-16a. Circuit Judge Clark, dissenting, agreed with Mr. Gibson that this Court's precedents concerning compulsory union and bar dues require an advance reduction, rather than a refund, and prohibit requiring objections issue-by-issue, and that Mr. Gibson is entitled to a remedy for past unconstitutional expenditures. *Id.* at 17a-21a. A timely petition for rehearing was denied. App. E at 43a-44a.

REASONS FOR GRANTING THE WRIT

I. THE QUESTIONS PRESENTED BY THIS CASE SHOULD BE SETTLED BY THIS COURT, BECAUSE OF THE EXCEPTIONAL IMPORTANCE OF DUE PROCESS IN PROTECTING FIRST-AMENDMENT FREEDOMS

Last Term, this Court held in *Keller v. State Bar*, 110 S. Ct. 2228 (1990), that the first amendment limits the purposes for which an "integrated" or "unified" state bar may spend dues which members pay as a condition of the practice of law. The use of compulsory bar dues to finance political and ideological activities to which an attorney objects violates his first-amendment rights of free association and speech when such expenditures are not "necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.'" *Id.* at 2233-37 (quoting *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961) (plurality opinion)).

The Court also held that as a pre-condition to collecting compulsory dues an integrated bar must adopt procedures to prevent the use of objectors' dues for constitutionally impermissible purposes, such as "the sort of procedures described in *Hudson*," a case involving compulsory union fees. Because the state bar in *Keller* had no procedures for dealing with objections, the Court did not determine there "whether one or more alternate procedures would likewise satisfy that obligation." *Id.* at 2237-38. The record in this case, however, presents such significant questions of first-amendment due process for the first time in the context of the compulsory bar.

These are important questions due to the large number of attorneys whose first-amendment freedoms are burdened by integrated bars. As of 1987, almost 500,000 attorneys paid an average of \$157.00 per year to the unified bars of the thirty-one states, the District of Columbia, and the Commonwealth of Puerto Rico that require bar membership as a condition of the

practice of law. See Division of Bar Servs., A.B.A., 1987 *Bar Activities Inventory*, Tab B & Tab C, Table 2. And, of course, the Court's disposition of these questions would also be precedential in "agency shop" cases, because of the "substantial analogy" between the integrated bar and compulsory union fee arrangements. See *Keller*, 110 S. Ct. at 2235-36.

This case is exceptionally important because of more than the number of individuals affected, moreover. Freedoms guaranteed by the first amendment are "rights which we value most highly and which are essential to the workings of a free society." Therefore, in protecting first-amendment rights, "the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied." *Speiser v. Randall*, 357 U.S. 513, 520-21 (1958); see *Hudson*, 475 U.S. at 303 n.12.

The Court twice acted upon that principle in an analogous context by granting certiorari in *Hudson* and *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), to consider the constitutionality of procedures adopted by unions to determine the amount of compulsory deductions and respond to nonmembers' objections. Indeed, in *Hudson*, 475 U.S. at 294, 300, as here, the only questions presented concerned what procedural safeguards are required by the first and fourteenth amendments for the collection of compulsory fees, and the Court explicitly cited the "importance of the case" as a reason for granting certiorari.

II. IN NOT REQUIRING AN ADVANCE REDUCTION, THE PANEL MAJORITY'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN HUDSON AND DECISIONS OF TWO OTHER UNITED STATES COURTS OF APPEALS

A. The Conflict With *Hudson*

The panel majority held, with Judge Clark dissenting, that the Bar need not provide an objector an advance reduction for

the proportion of dues that it expects to use for political activity, because "an interest-bearing escrow account (along with an otherwise satisfactory procedure) is sufficient." App. A at 13a-14a; *contra id.* at 17a-21a & n.3 (Clark, J., dissenting). That holding conflicts with this Court's decision in *Hudson*.

The panel majority relied on the fact that *Ellis*, 466 U.S. at 443-44, identified "advance reduction of dues and/or interest-bearing escrow accounts" as "readily available alternatives" to the statutorily and constitutionally impermissible "pure rebate approach." See App. A at 14a. However, as Judge Clark said, *id.* at 18a, the "majority simply misreads" *Hudson* in not recognizing that the later case requires *both* escrow *and* advance reduction.

As *Hudson* explained, *Ellis* merely "noted the possibility of 'readily available alternatives, such as advance reduction of dues and/or interest-bearing escrow accounts.'" *Ellis* did not decide whether an interest-bearing escrow account, by itself, would be constitutionally sufficient. *Hudson*, 475 U.S. at 304 (quoting *Ellis*, 466 U.S. at 444).

That question was reached for the first time in *Hudson*, because the union there had established an escrow for 100% of objectors' service fees. This Court held that *in addition* to that escrow, and other safeguards, an "appropriately justified *advance reduction* * * * [is] *necessary* to minimize both the impingement [on nonunion employees' first-amendment interests] and the burden" of objection. *Id.* at 309 (emphasis added). Advance reduction is necessary, because a requirement that objectors pay into escrow monies to which the union (or bar) undoubtedly is not entitled is both an unjustifiable burden and an infringement upon first-amendment interests. As Justice Brennan said in *Elrod v. Burns*, 427 U.S. 347, 355-56 (1976) (plurality opinion), a likely consequence of the compelled financial exaction is that "the individual's ability to act according to his beliefs and to associate with others of his political persuasion is constrained." *Accord Branti v. Finkel*, 445 U.S. 507, 513 n.8 (1980).

B. The Conflict Among Courts Of Appeals

The panel majority's holding that an advance reduction is not constitutionally required under *Hudson* also directly conflicts with the decisions of two other United States courts of appeals, the Sixth and Ninth Circuits, on the same question.

Two different panels of the Sixth Circuit have ruled that

Hudson clearly rejects the premise that a union may continue to collect a service fee equal in amount to the union dues once a non-union member has objected to such a procedure. Rather, the union must instead deduct from the service fee that amount which is undisputedly used for political or ideological purposes.

Damiano v. Matish, 830 F.2d 1363, 1369 (6th Cir. 1987); *accord Tierney v. City of Toledo*, 824 F.2d 1497, 1502-04 (6th Cir. 1987). In *Damiano*, 830 F.2d at 1369-70, the court explained that this "advanced reduction method is clearly a less burdensome method of accommodating non-union employees," because escrow of the part of dues that indisputably represents *nonchargeable* expenses "would unduly deny the employee's unqualified right to his property" and "insure that the dissenting employee could not use this property for his own preferred political, ideological or other elected purposes."

The Ninth Circuit has explicitly rejected the view of the panel majority in this case and followed the Sixth Circuit to "hold that advance reductions of agency shop fees are required by *Hudson* even where the agency fee procedure includes an escrow of 100% of the collected agency fees." *Grunwald v. San Bernardino City Unified School Dist.*, 917 F.2d 1223, 1227-28 (9th Cir. 1990) (2-1 decision).² A procedure under which the union

² *Grunwald*, 917 F.2d at 1227, incorrectly cites *Crawford v. Air Line Pilots*, 870 F.2d 155 (4th Cir. 1989) (argued en banc Oct. 3, 1989), *Hohe v. Casey*, 868 F.2d 69 (3d Cir.), *cert. denied*, 110 S. Ct. 144 (1989), and *Andrews v. Education*

collects more than "a reasonable estimate of the percentage of fees attributable to" constitutionally chargeable costs is not the "carefully tailored" procedure required by *Hudson*, 475 U.S. at 303, for the collection of compulsory fees. *Grunwald*, 917 F.2d at 1228.³

Ass'n of Cheshire, 829 F.2d 335 (2d Cir. 1987), as holding that no advance reduction is required by *Hudson*. In fact, only *Crawford*, 870 F.2d at 161, is directly on point, and it was vacated under Fourth Circuit Rule 35(c) by the grant of rehearing en banc. *Hohe*, 868 F.2d at 70, 74 n.7, was a decision on appeal from denial of a preliminary injunction and was "not intended to intimate any opinion regarding the ultimate merits"; moreover, the procedure in *Hohe* did provide an advance reduction, see *Hohe v. Casey*, 695 F. Supp. 814, 815 (M.D. Pa. 1988), *aff'd*, 868 F.2d 69 (3d Cir.), *cert. denied*, 110 S. Ct. 144 (1989). Advance reduction was not one of the issues determined in *Andrews*, 829 F.2d at 338-41, and the procedure there also apparently provided an advance reduction, see *id.* at 337-38.

³ The union cases cannot be distinguished on the theory, advanced in the court of appeals, "that when Bar dues are assessed * * *, the Bar does not yet know what political activity it will undertake in the coming year." App. A at 13a-14a. That is equally true when a union sets its dues amount before a fiscal year begins. A reasonable advance reduction can be based on the preceding year's expenditures. See *Hudson*, 475 U.S. at 307 n.18.

III. IN NOT MANDATING NOTICE OF THE REDUCED DUES AMOUNT BEFORE DUES ARE COLLECTED, AND IN REQUIRING ATTORNEYS TO OBJECT EACH TIME THE BAR TAKES A POLITICAL OR IDEOLOGICAL POSITION, THE PANEL MAJORITY'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN *HUDSON* AND ITS PRECURSORS AND DECISIONS OF THREE OTHER COURTS OF APPEALS

A. The Conflict With *Hudson* And Its Precursors

Under the Bar's scheme, members must pay their full annual dues on or before July 1 of each year, the beginning of the Bar's fiscal year. Fla. Stat. Ann., Rules Regulating Bar, Rule 1-7.3, 2-6.2 (West Supp. 1990). Later, during the fiscal year, the Bar gives notice each time that it takes a position on a legislative issue, and members must within forty-five days file an objection to that particular position or waive their right to object. Only then is some portion of the dues escrowed and, possibly, rebated. App. A at 6a n.8, 8a-9a. The panel majority, with Judge Clark dissenting, held that rebate scheme constitutional, despite the lack of pre-collection notice and the requirement of multiple, issue-by-issue objections. App. A at 15a-16a; *contra id.* at 20a-21a & n.4 (Clark, J., dissenting). That ruling conflicts with this Court's decisions in *Hudson* and the other, earlier compulsory union fee cases on which *Keller* relied.

The minimum "constitutional requirements for the * * * collection of [compulsory union and bar] fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Hudson*, 475 U.S. at 310; see *Keller*, 110 S. Ct. at 2237. The scheme approved by the panel majority satisfies *none* of those requirements.

First, potential objectors are provided inadequate information about the basis for the portion of dues that the Bar

claims they must pay. *Hudson*, 475 U.S. at 306, held that "[l]eaving the nonunion employees in the dark about the source of the figure for the agency fee—and requiring them to object in order to receive information—does not adequately protect the careful distinctions drawn in *Abood*" v. *Detroit Board of Education*, 431 U.S. 209 (1977). Adequate disclosure requires a union seeking to collect a compulsory fee to "identif[y] the [major categories of] expenditures for collective bargaining and contract administration that had been provided for the benefit of nonmembers as well as members," verified by an independent auditor, *not* merely the expenditures for purposes it concedes cannot be charged to objectors. *Hudson*, 475 U.S. at 306-07 & n.18.

In this context, adequate explanation of the basis for what an objecting attorney must pay includes the major categories of expenses, verified by an independent auditor, that the Bar claims "are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State,'" *Keller*, 110 S. Ct. at 2236 (quoting *Lathrop*, 367 U.S. at 843 (plurality opinion)). Such an explanation obviously is not provided by periodic notices that the Bar has taken a legislative position.

Indeed, the Bar's notices provide *less* information than the disclosure held constitutionally inadequate in *Hudson*, 475 U.S. at 306-07, which at least told nonmembers what part of a member's dues they were not required to pay. Here, an attorney must object even to find out whether the Bar claims that expenditures concerning the legislation in question are chargeable and what portion of his dues are used to fund that activity. See App. A at 6a n.8.

Second, in requiring an objection *every time* the Bar takes a legislative position, the Bar's scheme fails to provide "an expeditious, fair, and objective" means of challenging the amount of the dues before an impartial decisionmaker. Because first-amendment rights are at stake, the procedures for asserting objection must "facilitate [an individual's] ability to protect his

rights." *Hudson*, 475 U.S. at 307 & n.20. Not permitting a standing objection to all nonchargeable exactions unduly burdens the individual's ability to protect his first-amendment rights, as the Court explicitly held in *Abood*, 431 U.S. at 241 (footnote omitted):

To require greater specificity would confront an individual employee with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure. It would also place on each employee the considerable burden of monitoring all of the numerous and shifting expenditures made by the Union that are unrelated to its duties as exclusive bargaining representative.

The panel majority's assertion that the Bar's scheme does not confront an individual attorney with the dilemma identified in *Abood*, because an "objector need not provide any * * * information concerning the motivation for his objection or his own position concerning the legislative policy at issue," App. A at 15a-16a, is completely disingenuous. As *Abood*, 431 U.S. at 241 & n.42, explained, requiring an objector to specify the causes which he does not want to support financially "necessarily discloses, by negative implication, those causes [he] does support." Moreover, in any event the Bar's scheme places on the individual the considerable burdens of monitoring its publication twice a month to determine whether it has taken positions on political and ideological matters which he does not want to subsidize and of objecting every time it has.⁴

Third, the notice and subsequent escrow under the Bar's scheme are untimely. One purpose of the disclosure "of the basis

⁴ The record shows that, to avoid waiving his rights under the Bar's scheme, in 1986 an attorney would have had to object at least six separate times and specify some twenty-nine legislative positions of the Bar which he did not want to support. See R. 52 at 2-4.

for the fee" and "escrow for the amounts reasonably in dispute" is "to avoid the risk that dissenters' funds may be used temporarily for an improper purpose." *Hudson*, 475 U.S. at 305, 310. A "remedy which merely offers the dissenters the possibility of a rebate does not avoid" that risk and thus is constitutionally inadequate. *Id.* at 305-06; *accord Ellis*, 466 U.S. at 443-44. In short, *Hudson* requires that the notice which triggers escrow precede the collection of any compulsory fees.⁵

Here notice, opportunity to object, and subsequent escrow do not occur until after the member's dues have been collected, and the Bar has been able to spend them. There is both a certainty that some portion of the dues will be spent on the taking of legislative positions, because notice is not even given until after that has occurred, and a risk that still more will be spent on the advocacy of those positions during the time that it takes for notice to be given in the Bar's publication and objection made by the individual attorney. As Judge Clark said, the "Bar plan is a pure rebate plan which * * * uses Gibson's dues until he complains," a feature which has "been declared unconstitutional in several Supreme Court cases." App. A at 21a (dissenting).

B. The Conflict Among Courts Of Appeals

The panel majority's decision upholding the Bar's notice and objection scheme also conflicts with decisions of the United States courts of appeals for the First, Sixth, and Ninth Circuits.

In *Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620, 634-35 (1st Cir. 1990), the court held that an objection procedure adopted by the integrated bar of Puerto Rico was

⁵ That is not an unusual constitutional requirement: "An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (quoting *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 313 (1950)) (emphasis added); see *Fuentes v. Shevin*, 407 U.S. 67, 81-82 (1972).

unconstitutional under *Hudson*, because it had two defects identified above that the scheme here shares: 1) the failure of the bar "at the outset of a dues year to categorize its * * * actual anticipated expenditures" as chargeable or not so that individual attorneys have sufficient information to determine whether they wish to object; and, 2) "the need for objections to specific activities as a prerequisite for refunds."⁶

And, both the Sixth and Ninth Circuits have held "that notice of and adequate information concerning the agency fee must be given to all nonmembers *before* any fees may be collected from them." *Grunwald*, 917 F.2d at 1228 (9th Cir.); *accord Tierney*, 824 F.2d at 1503 (6th Cir.).

IV. IN DENYING A REFUND FOR PAST UNCONSTITUTIONAL SPENDING, THE PANEL MAJORITY'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS AS TO WHAT IS A SUFFICIENT PRAYER FOR RELIEF AND WHO HAS THE BURDEN OF PROOF IN COMPULSORY FEE CASES

The panel majority, with Judge Clark dissenting, denied Mr. Gibson a refund of the part of his compulsory dues that the Bar used to fund its nonchargeable political and ideological activities in the past. App. A at 9a n.11; *contra id.* at 19a-20a (Clark, J., dissenting). The majority declined to decide whether Mr. Gibson is entitled to a refund, because, it said, he "made no request for a refund or for monetary damages in his complaint; nor did he present any evidence on this issue at trial or on remand." *Id.* at 10a n.11. The first of those grounds for denying retroactive relief

⁶ *Schneider* would erroneously allow the bar to escrow the anticipated nonchargeable portion of dues, rather than provide an advance reduction as required by *Hudson*, *Damiano*, *Tierney*, and *Grunwald*. Compare *Schneider*, 917 F.2d at 634, with *supra* pp. 7-10. However, the objecting attorneys in *Schneider* apparently did not argue that advance reduction is required.

is clearly erroneous as a matter of fact, and both grounds are contrary to this Court's applicable decisions as a matter of law.

Mr. Gibson *did* request a refund or monetary damages, for his complaint prays for not only declaratory and injunctive relief, but also "all other relief to which Plaintiff appears to be entitled." R. 2 at 4, 10-11. Moreover, *Abood*, 431 U.S. at 241-42 & n.43, held that such a "general prayer" for other relief is as a matter of law sufficient to entitle objecting compulsory fee payors "to appropriate relief, such, for example, as the kind of remedies described in" *Machinists v. Street*, 367 U.S. 740 (1961), and *Railway Clerks v. Allen*, 373 U.S. 113 (1963). Those remedies included "the refund of a proportion of the [past] exacted funds in the proportion that union political expenditures bear to total union expenditures." *Abood*, 431 U.S. at 240; *see id.* at 238.

The panel majority's denial of a refund on the ground that Mr. Gibson presented no evidence as to what refund he is due, App. A at 10a n.11,⁷ assigns to him a burden of proof that is contrary to all of the Court's agency-shop decisions from *Allen* through *Hudson*. As summarized in *Hudson*, 475 U.S. at 306 & n.16 (emphasis added), the "nonmember's 'burden' is simply the obligation to make his objection known"; "*the union* retains the burden of proof" as to the proportion of its expenditures that are constitutionally chargeable. *Accord Ellis*, 466 U.S. at 457 n.15; *Abood*, 431 U.S. at 239-41 & nn.39-40; *Allen*, 373 U.S. at 118-19 & n.6, 122.

CONCLUSION

When a state compels an individual to pay a fee to a union or bar association as a condition of employment or the practice of a profession, it infringes on his or her rights of free speech and

⁷ Mr. Gibson did present evidence, both before and after the remand, of political and ideological positions taken by the Bar in the past. *See* App. C at 25a n.1; R. 52; *see also* R. 66 (affidavit of the Bar's executive director attaching a compilation of legislative positions of the Bar).

association. *See Keller*, 110 S. Ct. at 2233-36. This Court confirmed in *Hudson*, 431 U.S. at 303, that "the fact that those rights are protected by the First Amendment requires that the procedure [for collection of the fee] be carefully tailored to minimize the infringement."

As shown above, the decision of the court of appeals' panel majority in this case ignores that general rule of first-amendment law; approves procedures which omit important, minimum constitutional safeguards explicitly mandated by *Hudson* and its precursors; and thus conflicts with both this Court's applicable decisions and decisions of three other United States courts of appeals on the same fundamental issues. In addition, the panel majority repudiates fundamental rules of pleading and of burden of proof which this Court has held necessary to protect individual rights in causes of action such as this one. Therefore, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

**OPINION OF THE UNITED STATES
COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT**

July 23, 1990

[906 F.2d 624]

Robert E. GIBSON, Plaintiff-Appellant,

v.

**THE FLORIDA BAR and Members of
the Board of Governors,
Defendants-Appellees.**

No. 89-3388.

United States Court of Appeals,
Eleventh Circuit.

July 23, 1990.

[625] Before TJOFLAT, Chief Judge, ANDERSON and
CLARK, Circuit Judges.

TJOFLAT, Chief Judge:

In this case, the plaintiff, a member of the Florida Bar, appeals the district court's dismissal of his suit challenging the Florida Bar's procedures for handling objections to the Florida Bar's use of compulsory bar dues to fund its political lobbying. The district court held that the procedures satisfied the constitutional requirements articulated by the Supreme Court in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986). We affirm in part and reverse in part.

I.

On March 27, 1984, the plaintiff, Robert E. Gibson, filed a complaint against the Florida Bar and the members of its board of governors (the Bar) seeking a declaratory judgment and injunctive relief. Gibson claimed that the Bar was violating his

first and fourteenth amendment rights¹ by using a portion of his compulsory dues to fund political lobbying. Specifically, Gibson challenged the Bar's use of compulsory dues to fund its campaign in opposition to a constitutional initiative known as "proposition one."² He also generally challenged [626]the Bar's use of compulsory dues to fund political lobbying. Gibson immediately moved for a preliminary injunction to prevent the Bar from further advocating its position against proposition one.

On that same day, the Florida Supreme Court issued an order removing proposition one from the general election ballot on the ground that it failed to comply with the single-subject requirement of Fla. Const. art. XI, § 3. *See Fine v. Firestone*, 448 So.2d 984 (Fla.1984). Accordingly, on March 28th, the district court denied Gibson's request for a preliminary injunction. The case then proceeded to trial, and in August 1985, the court issued a final judgment upholding the validity of the challenged activity and denying Gibson's request for a permanent injunction.

In its judgment, the court first held that the Florida Supreme Court's decision in *Fine* did not moot Gibson's suit because Gibson still challenged the Bar's general practice of funding political advocacy with compulsory bar dues. The court then held that under *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1976), the Bar's general practice was constitutionally permissible. The court reasoned that "the State may intrude upon plaintiff's First Amendment rights where the intrusion is justified by a sufficiently important state interest, and

1. The first amendment, which the fourteenth amendment makes applicable to the States, *see Stromberg v. California*, 283 U.S. 359, 368, 51 S.Ct. 532, 535, 75 L.Ed. 1117 (1931), provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . . ; or the right of the people peaceably to assemble. . . ." U.S. Const. amend 1. For convenience, we label Gibson's claim a first amendment claim.

2. Proposition one, modeled after California's proposition thirteen, proposed an amendment to the Florida Constitution that would limit the amount of revenue that the State could collect through taxes.

so long as the intrusion is 'closely drawn.' " In the court's view, the Bar's purposes as articulated in the Integration Rule of The Florida Bar³ constituted a "sufficiently important state interest." Moreover, the Bar's policy on political advocacy was sufficient to ensure that the Bar's political positions⁴ would be closely enough related to these important state interests.

Gibson appealed this judgment. In *Gibson v. Florida Bar*, 798 F.2d 1564 (11th Cir.1986) [hereinafter *Gibson I*], a panel of this court reversed the district court and remanded the case for further proceedings. After a review of Supreme Court cases on the constitutionality of compulsory membership dues and of the

3. The Preamble to the Integration Rule provides, in pertinent part:

To inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence, the following principles are expressly adopted by the Court:

(a) The Florida Bar, a body created by and existing under the authority of this Court, is charged with the maintenance of the highest standards and obligations of the profession of law. . . .

4. Standing Board Policy 900 provided, in pertinent part:

a) The purposes of The Florida Bar are set forth in the Integration Rule. Neither The Florida Bar nor any of its committees or sections may take a position on legislation either as a proponent or opponent unless it is determined by the Board of Governors that the legislation is related to the purposes of The Florida Bar as set forth in the Integration Rule.

b) The Bylaws of The Florida Bar set forth the restrictions on establishing a legislative policy. Article VI, Section 2 of the Bylaws provides that:

No legislative matter shall be recommended, approved, disapproved or endorsed by The Florida Bar unless such action is initiated by a written report and recommendation of a committee and approved by a majority vote of the active members present at the [annual] meeting; or, legislative matters may be recommended, approved, disapproved, or endorsed on behalf of The Florida Bar at any time by two-thirds vote of the members of the Board of Governors present at the meeting, and during the time when the Legislature is in session the Executive Committee may act upon pending or proposed legislation.

use of those dues to support political activities, e.g., *Lathrop v. Donohue*, 367 U.S. 820, 81 S.Ct. 1826, 6 L.Ed.2d 1191 (1961); *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956); *International Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977); *Ellis v. Railway Clerks*, 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1985),⁵ the panel concluded [627] that the Bar's use of compulsory dues to support political activity would be constitutional if a "compelling interest" supported the Bar's activity and if the Bar had used the "least restrictive means" of achieving that interest. *Gibson I*, 798 F.2d at 1569. Applying this analysis, the panel held that the district court had not adequately evaluated whether "certain positions taken by the Bar were sufficiently related to its basic function to justify the expenditure of compulsory dues" and therefore remanded the case to the district court for further findings on this issue. *Id.*

At the conclusion of its opinion, the panel "stressed" that it had addressed "only the use of compelled fees by the Bar." As the panel noted,

the union was free to politicize on *any* issue of interest to that group. . . . Only the use of compelled funds was prohibited for issues unrelated to collective bargaining. . . . Similarly, the Bar may speak as a group on any issue as long as it does so without using the compulsory dues of dissenting members.

Id. at 1570 (citations omitted). In a footnote, the panel further explained that

5. The panel held that these cases, almost all of which involved unions rather than bar associations, also controlled in cases involving bar associations. See *Gibson I*, 798 F.2d at 1568-69. The Supreme Court has also expressly adopted this position in *Keller v. State Bar*, — U.S. —, 110 S.Ct. 2228, 2235-37, — L.Ed.2d — (1990). I discuss that case in more detail below. See *infra* note 12.

the difficult task of discerning proper Bar position issues could be avoided by one of two methods: (1) a voluntary program in which lawyers would not be compelled to finance the Legislative Program, but could contribute towards that program as they wished; or (2) a refund procedure allowing dissenting lawyers to notify the Bar that they disagree with a Bar position, then receive that portion of their dues allotted to lobbying.

Id. at 1570 n. 5. At the time of the panel's disposition, however, the Bar had no such program or procedure, and the panel therefore remanded the case to the district court for findings on the propriety of the Bar's political activity.

In November 1986, the Bar amended Standing Policy 900 to include a set of refund procedures. The Bar then moved the district court for a "judgment on the mandate" on the grounds that these procedures complied with the requirements announced in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986).⁶ The Bar's motion in effect requested leave of court to amend its answer to *Gibson's* complaint and to file a counterclaim. The amended answer would assert that the controversy described in *Gibson's* complaint was moot, and the counterclaim would request a declaration that the Bar's new procedures passed constitutional muster. The court implicitly gave the Bar leave to proceed in this fashion⁷ and, in March 1987, issued an order holding the case in abeyance for seventy days to allow for possible action by the Florida Supreme Court on the Bar's amendments to Standing Policy 900. The Bar subsequently undertook to amend its bylaws—a process requiring approval by the Florida Supreme Court—in order to incorporate the new procedure. The district court therefore

6. See *infra* at 629-630 (discussing *Chicago Teachers*).

7. The parties submitted no revised pleadings; rather, the amendment process took place through the parties' memoranda to the court and hearings before the court.

extended the abeyance until the Florida Supreme Court acted. On June 2, 1988, the Florida Supreme Court issued an opinion approving rule 2-9.3, the amended bylaw.⁸ See *Florida Bar Re*

8. 2-9.3 Legislative Policies.

(a) The board of governors shall adopt and may repeal or amend rules of procedure governing the legislative activities of The Florida Bar in the same manner as provided in rule 2-9.2; provided, however, that the adoption of any legislative position shall require the affirmative vote of two-thirds of those present at any regular meeting of the board of governors or two-thirds of the executive committee or by the president, as provided in the rules of procedure governing legislative activities.

(b) Publication of legislative positions. The Florida Bar shall publish notice of adoption of legislative positions in *The Florida Bar News*, in the issue immediately following the board meeting at which the positions were adopted.

(c) Objections to legislative positions of The Florida Bar. Any active member of The Florida Bar may, within forty-five (45) days of the date of publication of notice of adoption of a legislative position, file with the executive director a written objection to a particular position on a legislative issue. Failure to object within this time period shall constitute a waiver of any right to object to the particular legislative issue.

(1) After a written objection has been received, the executive director shall promptly determine the pro rata amount of the objecting member's dues at issue and such amount shall be placed in escrow pending determination of the merits of the objection. The escrow figure shall be independently verified by a certified public accountant.

(2) Upon the deadline for receipt of written objections, the board of governors shall have forty-five (45) days in which to decide whether to give a pro rata refund to the objecting member(s) or to refer the action to arbitration.

(d) Composition of arbitration panel. Objections to legislative positions of The Florida Bar may be referred by the board of governors to an arbitration panel comprised of three (3) members of The Florida Bar, to be constituted as soon as practicable following the decision by the board of governors that a matter shall be referred to arbitration.

[note continued]

Amendment to Rule 2-9.3 (Legislative [628]Policies), 526 So.2d 688 (Fla.1988). In April 1989, Gibson moved the district court to enjoin the application of the rule. After a hearing on the motion,

The objecting member(s) shall be allowed to choose one member of the arbitration panel, The Florida Bar shall appoint the second panel member, and those two (2) members shall choose a third member of the panel who shall serve as chairman. In the event the two (2) members of the panel are unable to agree on a third member, the chief judge of the Second Judicial Circuit of Florida shall appoint the third member of the panel.

(e) Procedures for arbitration panel. Upon a decision by the board of governors that the matter shall be referred to arbitration, The Florida Bar shall promptly prepare a written response to the objection and serve a copy on the objecting member(s). Such response and objection shall be forwarded to the arbitration panel as soon as the panel is properly constituted. The arbitration panel shall thereafter confer and decide whether the legislative matters at issue are constitutionally appropriate for funding from mandatory Florida Bar dues.

(1) The scope of the arbitration panel's review shall be to determine solely whether the legislative matters at issue are within those acceptable activities for which compulsory dues may be used under applicable constitutional law.

(2) The proceedings of the arbitration panel shall be informal in nature and shall not be bound by the rules of evidence. The decision of the arbitration panel shall be binding as to the objecting member(s) and The Florida Bar. If the arbitration panel concludes the legislative matters at issue are appropriately funded from mandatory dues, there shall be no refund and The Florida Bar shall be free to expend the objecting member's pro rata amount of dues held in escrow. If the arbitration panel determines the legislative matters at issue are inappropriately funded from mandatory dues, the panel shall order a refund of the pro rata amount of dues to the objecting member(s).

(3) The arbitration panel shall thereafter render a final written report to the objecting member(s) and the board of governors within forty-five (45) days of its constitution.

(4) In the event the arbitration panel orders a refund, The Florida Bar shall provide such refund within thirty (30) days of the date of the arbitration panel's report, together with interest calculated at the legal rate of interest as of the date the written objection was received by The Florida Bar.

the district court issued a final order in the case. Holding that rule 2-9.3 "meets the safeguards and requirements necessary for protection of members' first amendment rights, as set out in both the case of *Chicago Teachers Union v. Hudson* . . . and . . . *Gibson [I]*," the district court denied Gibson's request for injunctive relief and dismissed the case. Gibson appeals, challenging the constitutionality of rule 2-9.3.

II.

A. The Bar's Procedures.

As amended, rule 2-9.3 allows the Bar to adopt legislative positions pursuant to the procedures governing legislative activities in the Standing Board Policy 900, *see supra* note 4. If the Bar adopts a legislative position, the rule requires it to publish a notice of adoption in the next issue of The Florida Bar News, which is published twice monthly and mailed to all Bar members.⁹ The rule also provides a procedure for handling objections to the Bar's legislative positions. Within forty-five days of publication of the notice of adoption, any member of the Bar may "file with the executive director a written objection to a particular position on a legislative issue." Rule 2-9.3(c). If a member fails to object within that time period, he waives his right to object. Once the director receives the objection, he must determine the pro rata amount of the member's dues that is being [629]used to fund the Bar's political activity and must place that amount in escrow pending determination of the objection's merits. The rule gives the Bar forty-five days either to refund the member's pro rata share¹⁰ or to refer the matter to arbitration.

9. We take judicial notice of these facts, thereby granting a motion by the Bar that was carried with the case.

10. The rule does not state whether this refund includes interest. The Bar, however, has indicated throughout this case that its refund procedures do
[note continued]

If the Bar chooses to refer the matter to arbitration, it must prepare a written response to the member's objection, serve a copy of the response on the member, and forward a copy to the arbitration panel. The arbitration panel consists of three individuals, one chosen by the objecting member, another chosen by the Bar, and the third chosen by the first two individuals. The panel decides whether the political activity at issue can constitutionally be funded from compulsory bar dues, and its decision is binding on both the objecting member and the Bar. If the panel orders the Bar to refund the member, then within thirty days, the Bar must refund the member's pro rata share with interest, which is calculated at the legal rate from the date the Bar received the member's written objection. *See supra* note 9; *infra* at 628.

B. Gibson's Contentions.

Gibson challenges these procedures on several grounds. His primary contention is that the Supreme Court cases in this area require an advance deduction rather than a refund. He also contends that the Bar's scheme unconstitutionally requires the dissenter to object on an issue-by-issue basis, thus unconstitutionally forcing the dissenter to identify his own position, and that the arbitration panel is impermissibly composed of other Bar members who necessarily have a monetary interest in the dispute. Gibson further claims that even if the refund scheme is permissible, the Bar improperly calculates interest only as of the date the Bar receives the member's written objection.¹¹ After reviewing

include interest. Presumably, the Bar calculates interest on refunds paid within forty-five days after receipt of the written objection just as it calculates interest on refunds paid pursuant to an arbitration panel's order: "at the legal rate of interest as of the date the written objection was received by The Florida Bar." Rule 2-9.3(e)(4). We discuss the sufficiency of this provision below. *See infra* notes 13-14 & accompanying text.

11. Gibson also requests an award of retroactive damages in the form of a refund for the proportion of his compulsory dues that the Bar has used to
[note continued]

the Supreme Court's pronouncements in *Chicago Teachers*, we address these contentions in turn.

C. Analysis.

In *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), the Supreme Court considered whether the grievance procedure established by a teachers union to process objections by non-union members concerning the use of their dues was constitutionally sufficient. The union in that case acted as the exclusive collective-bargaining representative of approximately ninety-seven percent of Chicago's public school teachers. Nonmembers received the benefits of union representation without paying dues. In 1982, the union entered into an agreement with the Chicago Board of Education, whereby the Board would deduct "proportionate share payments" from nonmembers' salaries.

The union also established procedures for handling nonmembers' objections about the deductions. Pursuant to these procedures, once the deduction had been made, the nonmember could object within thirty days in writing to the union president. If both the union's executive committee and its executive board decided against the objector, then the union president would select a single arbitrator from a list maintained by the Illinois Board of Education. If the arbitrator ruled in favor of the objector, then the union would give the objector [630] a rebate and reduce the amount of future deductions for all nonmembers.

When the first paycheck deduction was taken in 1982, several nonmembers objected, contending that the union was using a proportion of their dues for activity unrelated to collective bargaining. The union sent brief responses to the nonmem-

fund its political lobbying in the past. Gibson, however, now makes this request for the first time. He made no request for a refund or for monetary damages in his complaint; nor did he present any evidence on this issue at trial or on remand. We, therefore, do not reach this question.

bers, explaining how the proportionate deduction had been calculated and describing the objection procedures. The objecting nonmembers then brought suit in federal court challenging the objection procedures.

The Supreme Court began its evaluation of the procedures with a review of *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977). As the Court stated, *Abood* stands for the proposition that, although a public employer may constitutionally designate a union to be an exclusive collective-bargaining representative and require its nonmember employees to pay a fair share of the costs relating to the union's collective-bargaining, the nonmembers cannot constitutionally be required to support political activity by the union that is unrelated to the union's collective-bargaining duties. *Chicago Teachers*, 475 U.S. at 301-02, 106 S.Ct. at 1073 (citing *Abood*, 431 U.S. at 234, 97 S.Ct. at 1799). Thus, "[t]he objective" of the procedures for handling objections "must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Id.* 475 U.S. at 302, 106 S.Ct. at 1074 (quoting *Abood*, 431 U.S. at 237, 97 S.Ct. at 1800).

Applying this standard, the Court determined that the union's procedure was defective in three respects. First, the possibility of a rebate did not adequately ensure against the risk that the objectors' funds would be used even temporarily for an improper purpose. *Id.* 475 U.S. at 305, 106 S.Ct. at 1075. Second, the union's advance reduction of nonmembers' dues was inadequate because the union failed to provide information on how the proportionate share had been determined. *Id.* at 306, 106 S.Ct. at 1075. Third, because the union "entirely controlled" the arbitration procedure "from start to finish," the procedure did not provide for a "reasonably prompt decision by an impartial decisionmaker." *Id.* at 308, 307, 106 S.Ct. at 1076-77, 1076.

The Court also considered whether a 100% escrow of the nonmembers' dues would eliminate the procedure's defects. The

court held that the escrow would eliminate the procedure's first flaw—the risk that nonmembers' contributions would be temporarily used for impermissible purposes. Indeed, the court expressly stated that a 100% escrow was not necessary; an escrow of the proportion at issue would be sufficient. Even a 100% escrow, however, did not eliminate the procedure's second and third defects. *Id.* at 309-10, 106 S.Ct. 1077-78. The Court therefore held the procedure unconstitutional, concluding as follows:

We hold today that the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.

Id. at 310, 106 S.Ct. at 1078.

We apply the *Chicago Teachers* holding to the present case in order to determine whether, in light of Gibson's challenge, the objection procedures established by the Bar in rule 2-9.3 accomplish the required "objective . . . of preventing compulsory subsidization of ideological activity by [Bar members] who object thereto without restricting the [Bar's] ability to require every [member] to contribute to the cost of [permissible] activities." *Id.* at 302, 106 S.Ct. at 1074 (quoting *Abood*, 431 U.S. at 237, 97 S.Ct. at 1800).¹² We consider Gibson's contentions in turn.

12. This application of *Chicago Teachers* is consistent with the Supreme Court's recent decision in *Keller v. State Bar*, — U.S. —, 110 S.Ct. 2228, — L.Ed.2d — (1990). In *Keller* members of the California State Bar challenged the Bar's use of mandatory dues to finance political activities. The Supreme Court applied the rule in *Abood* that unions, and by implication bar associations, cannot fund political activities from the mandatory dues of employees or bar members who object to such expenditures. *See id.* — U.S. at —, 110 S.Ct. at 2233-35. Of course, as the Court noted in *Keller*, political activities can still be funded from mandatory dues of non-objecting employees

[note continued]

[631]

1.

Gibson first argues that the Supreme Court cases require the Bar to provide an advance deduction for the proportion of dues that the Bar knows will be used for political activity. In response, the Bar contends that the cases clearly approve an interest-bearing escrow account as an alternative. In addition, the Bar claims that an advance deduction would not be feasible. It argues that when Bar dues are assessed on July 1, the Bar does not yet know

or bar members. *See id.* The Court pointed to *Chicago Teachers* as the case in which the Court "outlined a minimum set of procedures by which a union . . . could meet its requirement under *Abood*," *id.* — U.S. at —, 110 S.Ct. at 2237, that is, by which the union or bar could ensure that objecting members' dues were not used to finance the political activity at issue.

Unlike the Florida Bar in the present case, however, the California Bar provided no procedures for handling bar members' objections to such expenditures. The Court in *Keller* thus addressed the California Bar's broader argument that *Abood* did not apply to its use of compulsory dues to finance political activities because the Bar was a state agency and therefore could use the dues for any purpose within its broad statutory authority. *See id.* — U.S. at —, 110 S.Ct. at 2228. The Supreme Court rejected this argument and held that the Bar was subject "to the same constitutional rule [under *Abood*] with respect to the use of compulsory dues as are labor unions representing public and private employees." *Id.* — U.S. at —, 110 S.Ct. at 2235. The Court then suggested what kinds of expenditures, at "the extreme end[] of the spectrum," *id.*, would implicate that rule and remanded the case for further proceedings consistent with the opinion.

The Court in *Keller* thus reaffirmed the holdings of *Abood* and *Chicago Teachers* and expressly applied those holdings to state bar associations as well. Because the case before it lacked a developed record regarding possible procedures to satisfy this requirement, however, the Court declined to conduct any analysis of what procedures would satisfy the mandate of *Chicago Teachers* under the circumstances in *Keller*. *See id.* — U.S. at —, 110 S.Ct. at 2237-38. The present case, in contrast, involves exactly such an issue concerning the Florida Bar's objection procedures. We therefore undertake to analyze those procedures under *Chicago Teachers*—an undertaking which is entirely consistent with the Supreme Court's recent pronouncements in *Keller*.

what political activity it will undertake in the coming year. Moreover, it does not spend a fixed amount on political activity from year to year.

We reject Gibson's reading of the caselaw on this point. In *Ellis v. Railway Clerks*, 466 U.S. 435, 443-44, 104 S.Ct. 1883, 1889-90, 80 L.Ed.2d 428 (1984), the Supreme Court invalidated a "pure rebate approach" but noted the existence of "readily available alternatives, such as advance reduction of dues *and/or* interest-bearing escrow accounts." (Emphasis added.) The Court restated this proposition in *Chicago Teachers*, 475 U.S. at 303-04, 106 S.Ct. at 1074 (quoting *Ellis*), and stated that "an escrow for the amounts reasonably in dispute," along with an adequate explanation of the fee and an opportunity to challenge the amount, would satisfy the constitutional requirements for an objection procedure, *id.* at 310, 106 S.Ct. at 1078. These statements provide indisputable authority that an interest-bearing escrow account (along with an otherwise satisfactory procedure) is sufficient. Gibson would have us believe that these statements are merely dicta and thus not controlling. He suggests that every objection procedure approved by the Supreme Court has involved an advance deduction. In light of the Court's express approval of a proportionate escrow in *Chicago Teachers*, we reject Gibson's argument.

Gibson also challenges rule 2-9.3(e)(4), which provides for the calculation of interest on refunds after arbitration only "as of the date the written objection was received."¹³ We hold that this formula for [632]calculating interest is not sufficient to "avoid the risk that [the objecting members'] funds will be used,

13. As we note above, *supra* note 10, rule 2-9.3 does not specify whether refunds issued without arbitration (within forty-five days after the Bar receives a written objection, pursuant to section (c)(2)) include interest. At oral argument, the Bar asserted that its refund procedures included interest payments. Based on this representation, we assume that refunds pursuant to section (c)(2) include interest, which is calculated in the same fashion as interest on refunds pursuant to section (c)(4).

even temporarily, to finance ideological activities," *Abood*, 431 U.S. at 244, 97 S.Ct. at 1804 (Stevens, J., concurring). By calculating interest only "as of the date the written objection was received," the Bar can use the interest generated by the members' dues from the time of payment in July until the time of the objection. As the Bar has argued, it may not begin its lobbying until later in the year. Even if a member objects promptly after receiving notice of the Bar's position in the Florida Bar News, the Bar can still make use of the interest generated from the member's proportionate share until that time. We therefore find Gibson's attack on this point to be persuasive.¹⁴ In order to protect against the danger that the objecting members' funds will be used in this way to finance the Bar's political activity, the Bar would have to calculate interest as of the date that payment of the members' bar dues was received.

2.

Gibson next contends that the Bar's procedures impermissibly require dissenting members to object on an issue-by-issue basis, thus forcing them to identify their own political positions. The Bar responds that members need only make a generalized objection that a given issue is not closely enough related to the Bar's purposes to justify an expenditure of compulsory dues. The Bar claims that such an objection does not impermissibly require objectors to disclose their own position regarding the issue. We agree.

As the Supreme Court has stated, the dissenter "has the burden of raising an objection." *Chicago Teachers*, 475 U.S. at 306, 106 S.Ct. at 1075 (citing *Abood*, 431 U.S. at 239-40 & n. 40, 97 S.Ct. at 1801-02 & n. 40). This burden "is simply the obligation to make his objection known." *Id.* 475 U.S. at 306 n. 16, 106 S.Ct. at 1075 n. 16. The affirmative objection requirement here is within the scope of this obligation. It merely requires the

14. Our holding applies as well to the calculation of interest on refunds issued pursuant to section (c)(2).

objector to inform the Bar that he objects to the Bar's use of compulsory dues to support a given legislative policy. Beyond that, the objector need not provide any further information concerning the motivation for his objection or his own position concerning the legislative policy at issue. We therefore reject Gibson's challenge on this point.

3.

Finally, Gibson challenges the composition of the arbitration panel under rule 2-9.3. He claims that the panel is impermissibly composed of Bar members, who necessarily have an interest in the arbitration's outcome. The Bar responds that an arbitrator's mere membership in the Bar is insufficient to taint the arbitration proceeding. We agree with the Bar.

In *Chicago Teachers* the Court held that the arbitration procedure was objectionable because it was "from start to finish . . . entirely controlled by the union." 475 U.S. at 308, 106 S.Ct. at 1076-77. Under the procedures in that case, the union itself selected a single arbitrator. The procedures here are clearly distinguishable. Rule 2-9.3 provides for a tripartite arbitration panel, and although the Bar picks one panel member, the objector picks another, and the third is chosen by the first two members of the panel. Thus, the Bar has nowhere near the degree of control over the arbitration process that the union had in *Chicago Teachers*. Given the nature of arbitration panels in this case—composed of arbitrators representing the competing parties' interests—whatever interest the arbitrators might have in the outcome as members of the Bar has no significance whatsoever. We therefore reject Gibson's challenge on this basis as well.

III.

For the foregoing reasons, we hold that the Bar's procedures for handling objec[633]tions to its political lobbying are sufficient except for the formula for calculating interest on refund payments. The district court's decision is therefore AFFIRMED in part and REVERSED in part.

IT IS SO ORDERED.

CLARK, Circuit Judge, dissenting:

I dissent. I agree with appellant Gibson. His position is stated by the majority (at 629): "[Gibson's] primary contention is that the Supreme Court cases in this area require an advance deduction rather than a refund." In affirming the district court on this point, the majority fails to follow the precedent of *Gibson I*¹, which held:

The *Abood* court concluded that a union may not spend compelled fees for the advancement of political views or ideological causes that are not incidental to the union's role as bargaining unit. . . . Stated another way, "*Abood* held that employees may not be compelled to support a union's ideological activities unrelated to collective bargaining. The basis for the holding that associational rights were infringed was the compulsory collection of dues from dissenting employees."

* * * * *

The similarities between union dues and integrated bar dues are so substantial that we may safely transpose the *Abood* holding to the facts presented in this appeal as follows: the Florida Bar may use compulsory Bar dues to finance its Legislative Program *only* to the extent that it assumes a political or ideological position on matters *that are germane to the Bar's stated purposes*. (Emphasis added.)

* * * * *

The proper focus in this action should be upon the actual results of the Bar's Legislative Program, *i.e.*, whether past positions of the Bar were sufficiently related to its purpose

1. *Gibson v. The Florida Bar*, 798 F.2d 1564 (11th Cir.1986).

of improving the administration of justice. On this issue, *the Bar bears the burden of proving that its expenditures were constitutionally justified.* (Emphasis added.)

Gibson I, 798 F.2d at 1567-69 (citations omitted). There is no dispute about the fact that the Bar has never established that "its expenditures were constitutionally justified."

The majority simply misreads *Chicago Teachers Union v. Hudson*.² The panel says, "The union also established procedures for handling nonmembers' objections about the deductions." (at 629). The panel compares the procedure there to the procedure in the Florida Bar rule. The panel overlooks that the nonmembers in *Chicago Teachers* were only paying 95% of the union dues as a consequence of the union making advance deductions for activities not germane to pure union objectives. As described in *Chicago Teachers*, 475 U.S. at 295, 106 S.Ct. at 1070, the union identified expenditures unrelated to collective bargaining and contract administration for the past year and found them to be approximately 5%.

The union in *Chicago Teachers* did exactly what appellant Gibson is asking our court to require the Bar to do in this case. It deducted in advance that portion of the dues allocable to those expenditures it acknowledged to be unrelated to collective bargaining and contract administration. The union then went on to establish a procedure where nonmembers could object to expenditures by the union of payments from any part of the 95% used toward legislative and political activities which were nevertheless still anathema to those nonmembers. The panel adopts this latter procedure without requiring the Bar to deduct in advance that part of Gibson's dues which can be approximated

2. 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986).

from experience to be allocable to non-administration of justice lobbying activities.³

[634] Such "non-administration of justice" lobbying was identified in note 1 of *Gibson I* as positions that had been taken by the Florida Bar in the past: "(1) opposed tort reform; (2) opposed limitation of damages in medical malpractice actions; (3) opposed changes in the state sales tax; (4) opposed changes in the state's taxation and venue powers; and (5) advocated regulation of child care centers." *Id.* at 1565 n. 1.

The panel in note 4 of *Gibson I* identified as acceptable areas for Bar lobbying to be: "(1) questions concerning the regulation of attorneys; (2) budget appropriations for the judiciary and legal aid; (3) proposed changes in litigation procedures; (4) regulation of attorneys' client trust accounts; and (5) law school and Bar admission standards." *Id.* at 1569 n. 4. It is the law of the case that the Bar has in the past expended members' dues for lobbying activities unrelated to the administration of justice. Gibson won his case before the first panel and

3. The majority accepts the Bar's argument "that advance deductions would not be feasible" because the Bar claims it "does not yet know what political activity it will undertake in the coming year." This is rebutted in the Court's recent opinion in *Keller v. State Bar of California*, — U.S. —, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990). The Court specifically states it is in agreement with Justice Kaufman's dissent in the California Supreme Court case where he said:

Since the bar already is statutorily required to submit detailed budgets to the Legislature prior to obtaining approval for setting members' annual dues (Bus. and Prof.Code § 6140.1), the argument that the constitutionally mandated procedures would create 'an extraordinary burden' for the bar is unpersuasive. 'While such a procedure would likely result in some additional administrative burden to the bar and perhaps prove at times to be somewhat inconvenient, such additional burden or inconvenience is hardly sufficient to justify contravention of the constitutional mandate. It is noteworthy that unions representing government employees have developed, and have operated successfully within the parameters of *Abood* procedures for over a decade.' [47 Cal.3d 1152, 255 Cal.Rptr. 542, 568] 767 P.2d 1020, 1046. (Emphasis added.)

loses here by not being afforded a remedy. He is entitled to the same relief allowed to the plaintiffs in *Abood*, *Chicago Teachers*, and *Ellis*.

In *Chicago Teachers*, the Supreme Court opens with this quotation:

In *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), "we found no constitutional barrier to an agency shop agreement between a municipality and a teacher's union insofar as the agreement required every employee in the unit to pay a service fee to defray the costs of collective bargaining, contract administration, and grievance adjustment. The union, however, could not, consistently with the Constitution, *collect from dissenting employees any sums for the support of ideological causes not germane to its duties as collective-bargaining agent.*" *Ellis v. Railway Clerks*, 466 U.S. 435, 447, 104 S.Ct. 1883, 1892, 80 L.Ed.2d 428 (1984). (Emphasis added.)

475 U.S. at 294, 106 S.Ct. at 1069, 89 L.Ed.2d at 239. By permitting the Florida Bar to *collect* dues from the dissenter Gibson and then requiring him to notify the Bar of those individual lobbying activities to which he objects,⁴ the majority

4. The majority rejects Gibson's First Amendment claim that he should not be required to identify on an issue-by-issue basis those political positions to which he objects. Again the majority ignores *Abood* which holds:

But in holding that as a prerequisite to any relief each appellant must indicate to the Union the *specific* expenditures to which he objects, the Court of Appeals ignored the clear holding of [*Railway Clerks v. Allen*] [373 U.S. 113, 83 S.Ct. 1158, 10 L.Ed.2d 235 (1963)]. As in *Allen*, the employees here indicated in their pleadings that they opposed ideological expenditures of *any* sort that are unrelated to collective bargaining. To require greater specificity would confront an individual employee with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public

[note continued]

pays little or no attention to Supreme Court authority and our prior panel opinion.

The majority also misapplies *Ellis v. Railway Clerks*, 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984). The majority quotes the Supreme Court as invalidating a "pure rebate approach" but noted the existence of "readily available alternatives, such as advance reduction of dues *and/or inter[635]est-bearing escrow accounts.*" (at 631). But the Court went on to say, "Given the existence of acceptable alternatives, the union cannot be allowed to commit dissenters' funds to improper uses even temporarily." *Ellis*, 466 U.S. at 444, 104 S.Ct. at 1890, 80 L.Ed.2d at 439. The Bar plan is a pure rebate plan which places the burden of proving the impropriety of the Bar's expenditure upon the member and uses Gibson's dues until he complains. These features of the Bar's plan have been declared unconstitutional in several Supreme Court cases.

For the foregoing reasons, I dissent.

disclosure. It would also place on each employee the considerable burden of monitoring all of the numerous and shifting expenditures made by the Union that are unrelated to its duties as exclusive bargaining representative.

97 S.Ct. at 1802-03 (emphasis in original; footnote omitted).

APPENDIX B

**FINAL ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA**

May 3, 1989

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

ROBERT E. GIBSON, [Clerk's Stamp omitted in printing -
Filed May 3, 1989]

Plaintiff,

v.

CASE NO. TCA 84-7109-MMP

THE FLORIDA BAR, et al.,

Defendants.

FINAL ORDER

This cause is before the court upon the plaintiff's emergency motion for preliminary injunction (doc. 68), on which argument was heard on May 2, 1989. This court has reviewed the rules and procedures recently implemented by the Florida Bar, which were adopted by the Florida Supreme Court in The Florida Bar Re Amendment to Rule 2-9.3 (Legislative Policies), 526 So. 2d 688 (Fla. 1988), and now codified as rule 2-9.3, Legislative policies, Rules Regulating the Florida Bar. The rule as adopted meets the safeguards and requirements necessary for protection of members' first amendment rights, as set out in both the case of Chicago Teacher's Union v. Hudson, 475 U.S. 292, 106 S. Ct. 1066 (1986), and the Eleventh Circuit opinion in the case at bar, Gibson v. The Florida Bar, 798 F.2d 1564 (11th Cir. 1986).

Accordingly, the plaintiff's motion for preliminary injunction is DENIED. Further, as no subsequent proceedings are necessary in this case, this case is hereby DISMISSED. This court reserves jurisdiction to determine any appropriate costs to be awarded.

DONE AND ORDERED this 2nd day of May, 1989.

/s/Maurice M Paul
United States District Judge

APPENDIX C

**OPINION OF THE UNITED STATES
COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT**

September 15, 1986

[798 F.2d 1564]

Robert E. GIBSON, Plaintiff-Appellant,

v.

**THE FLORIDA BAR and Members of
the Board of Governors,
Defendants-Appellees.**

No. 85-3711.

United States Court of Appeals,
Eleventh Circuit.

Sept. 15, 1986.

[1565] Before HILL, Circuit Judge, HENDERSON,* Senior
Circuit Judge, and LYNNE**, Senior District Judge.

LYNNE, Senior District Judge:

I.

In this constitutional challenge to the lobbying activities of the Florida Bar, plaintiff Robert E. Gibson contends that the Bar violated his first amendment rights of free speech and association by spending compulsory bar dues to espouse political and ideological positions. The district court found that the Bar's stated purpose of improving the administration of justice served as a sufficiently important governmental interest to justify the intrusion upon Gibson's rights caused by the Bar's Legislative

* See Rule 3(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable Seybourn H. Lynne, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

Program. We reverse, holding that certain positions taken by the Bar are not sufficiently germane to its administration-of-justice function to justify the expenditure of compulsory dues.

II. FACTUAL AND PROCEDURAL BACKGROUND

The Florida Supreme Court, pursuant to Article V, Section 15 of the Florida Constitution, has exclusive jurisdiction to regulate the admission to practice and discipline of attorneys. The court has mandated that, in order to practice law in Florida, one must be a member in good standing of the Florida Bar, which in turn requires the payment of annual dues. *See Integration Rule of the Florida Bar*, Articles II, VIII. In the Integration Rule, the supreme court delineates the purposes of the Bar as threefold: "to inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence." *Id.*

The Bar engages in a Legislative Program in which it lobbys before the Florida Legislature and takes official positions on various public issues.¹ The Bar has adopted Standing Board Policy 900, which sets forth regulations and procedures by which the Bar takes positions on ballot questions and legislative matters. Under Policy 900, either the Bar's Legislation [1566] Committee or Executive Committee considers an issue and determines whether its subject matter is within the scope of the Bar's authority as set forth in its Rules and By-Laws. If so, the committee then determines by majority vote what position the Bar should adopt with respect to that issue. The Bar Board of

1. In addition to traditional legislative lobbying measures, the Bar promulgates its political and ideological positions through official Bar publications and speeches by Bar officials. The record demonstrates that the Bar has espoused the following positions: (1) opposed tort reform; (2) opposed limitation of damages in medical malpractice actions; (3) opposed changes in the state sales tax; (4) opposed changes in the state's taxation and venue powers; and (5) advocated regulation of child care centers.

Governors then considers the recommendation of the committee and determines the official Bar position.

Appellant Robert E. Gibson is a member in good standing of the Florida Bar. Gibson actively and financially supported a campaign on behalf of "Proposition One," a ballot question seeking limitation of government revenue that eventually was stricken from the ballot. When the Bar publicly announced its opposition to Proposition One, Gibson filed this action for declaratory and injunctive relief, claiming that the Bar's use of compulsory dues constituted a violation of his first amendment rights of free speech and association. Gibson contended that the first amendment prohibited the use of compulsory dues to advocate any position on any matter other than direct advocacy to a judicial body. The case was tried before the district court, which entered a judgment in favor of the Bar. The district court held that the Bar's administration-of-justice function was "a 'sufficiently important' state interest to justify the degree of intrusion into plaintiff's rights occasioned by the Bar's legislative program." This appeal followed.

III. DISCUSSION

At the heart of this appeal is the appellant's contention that his rights of free speech and association have been infringed by the Bar's use of compulsory dues to espouse political and ideological positions with which the appellant does not agree.²

2. "Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs." *Healy v. James*, 408 U.S. 169, 181, 92 S.Ct. 2338, 2346, 33 L.Ed.2d 266 (1972). "[F]reedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments." *Kusper v. Pontikes*, 414 U.S. 51, 56-57, 94 S.Ct. 303, 307, 38 L.Ed.2d 260 (1973).

The legal underpinnings necessary to resolve this question are derived from a series of United States Supreme Court cases, one of which upholds the constitutionality of the integrated state bar, and others which involve the closely analogous situation where union members are forced to financially support union lobbying measures through compelled membership dues or agency shop fees.

A. *Constitutionality of Compulsory Membership Dues*

In *Lathrop v. Donahue*, 367 U.S. 820, 81 S.Ct. 1826, 6 L.Ed.2d 1191 (1961), the Court addressed the question of the constitutionality of the Wisconsin integrated bar. Six members of the Court agreed that, when its membership requirement was limited to the compulsory payment of reasonable annual dues, Wisconsin's integrated bar caused no "impingement upon protected rights of association." 367 U.S. at 843, 81 S.Ct. at 1838. *Lathrop* stopped short, however, of a resolution of the very issue before this court: whether the use of dues money to support political activities of the state bar infringed upon constitutional rights of free speech. The plurality opinion of the Court concluded that the record in *Lathrop* provided no sound basis for deciding this additional constitutional challenge.³

A state may restrict the speech of a private person only when the restriction is a precisely drawn means of serving a compelling state interest. *Consolidated Edison Co. v. Public Service Comm.*, 447 U.S. 530, 540, 100 S.Ct. 2326, 2334 (1980).

3. In his concurring opinion, Justice Harlan strenuously contended that because it was not unconstitutional to require the payment of dues, it could not be unconstitutional for a state bar to use such funds to fulfill a basic purpose for which the bar was established. Assuming that there existed some valid distinction between free association and free speech rights in the context of an integrated bar, Justice Harlan stated that the integrated bar did not divest Wisconsin lawyers of the freedom of individual thoughts, speech, and association. (P. 881) The concurrence went on to state that the state interest

[note continued]

[1567] Admittedly, *Lathrop v. Donahue* offers little, if any, specific guidance on the first amendment rights at issue in this appeal. See *Aboud v. Detroit Board of Education*, 431 U.S. at 233, n. 29, 97 S.Ct. at 1798 n. 29. Unfortunately, *Lathrop* is the last Supreme Court decision squarely to address the first amendment rights of lawyers in an integrated bar. For additional illumination in this area, we must turn to the closely related situation where employees are required by law to contribute funds to labor unions, which in turn use some portion of those funds for political activities similar to the Florida Bar's legislative program. The close connection between these two groups was recognized in *Railway Employees' Dept. v. Hanson*, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956), when the Court held that the first amendment did not excuse employees from government-sanctioned, compelled membership in a union as a condition of continued employment. *Hanson* recognized that compelled union dues do infringe upon first amendment rights, but held that Congress' desire to promote collective bargaining was a sufficiently compelling governmental interest to justify such an infringement. When explaining its justification of compulsory union dues, the Court alluded to the integrated bar as an *a fortiori* example of a type of required membership that passes constitutional muster. 351 U.S. at 238, 76 S.Ct. at 721.

In *International Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961), the Court considered a related issue also arising out of union membership required by the Railway Labor Act: whether compelled union dues could be used to finance election campaigns and lobbying activities. The Court avoided deciding this challenge on a constitutional basis, holding that the Act prohibited the use of compulsory dues for political purposes. 367 U.S. at 768, 81 S.Ct. at 1799.

in an integrated bar is "sufficiently important to justify whatever incursions on these individual freedoms may be thought to arise" from the compulsory dues requirement. (P. 861)

B. Use of Compulsory Fees for Political Purposes

In *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), the Court faced a challenge to an agency shop agreement under which all teachers who failed to join the union were required to pay the union a service fee equal to the regular dues amount. *Abood* followed the rationale of *Hanson and Street*, *supra*, holding that the government's interest in promoting collective bargaining and discouraging "free riders," (employees who benefit from union representation without contributing financially), justified the agency shop agreement in question. The Court continued, however, to address the issue it chose to avoid in *Hanson*, *Lathrop*, and *Street*: whether fees compelled by law as a condition of continued employment could be used for political and ideological purposes.

Abood first observed that former Supreme Court decisions "established with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments. [citations omitted] . . . [C]ontributing to an organization for the purpose of spreading a political message is protected by the First Amendment." 431 U.S. at 233, 97 S.Ct. at 1798. The Court further held that any "limitations upon the freedom to contribute implicate fundamental First Amendment interests," (citing *Buckley v. Valeo*, 424 U.S. 1, 23, 96 S.Ct. 612, 636, 46 L.Ed.2d 659 (1976)), and stated that compelled contributions caused no less an infringement upon constitutional rights than prohibited contributions. *Id.* 431 U.S. at 234, 97 S.Ct. at 1799. The *Abood* court concluded that a union may not spend compelled fees for the advancement of political views or ideological causes that are not incidental to the union's role as bargaining unit. *Id.* at 235, 97 S.Ct. at 1799. Stated another way, "*Abood* held that employees may not be [1568]compelled to support a union's ideological activities unrelated to collective bargaining. The basis for the holding that associational rights were infringed was the compulsory collection of dues from dissenting employees." *Minnesota Board for Community Colleges v. Knight*, 465 U.S. 271, 291, n. 13, 104 S.Ct. 1058, 1070 n. 13, 79 L.Ed.2d 299 (1984).

C. Applying *Abood* to the Florida Bar

At the risk of oversimplification, *Abood* may be read to say that compulsory union or agency shop fees may not be spent on lobbying or ideological activities that are not germane to the purpose that brought the union together in the first place. See *Ellis v. Railway Clerks*, 466 U.S. 435, 447, 104 S.Ct. 1883, 1891, 80 L.Ed. 428, 447 (1985). As stated *supra*, the Supreme Court has referred to the similarity between union dues and bar dues, see *Railway Employees' Dept. v. Hanson*, 351 U.S. at 238, 76 S.Ct. at 721; *Abood v. Detroit Board of Education*, 431 U.S. at 233, 97 S.Ct. at 1798, and the two situations are very similar. Both the union employee and the integrated bar member are required by law to pay a fee. Both individuals' funds are then spent by an organization with an interest in altering the political process to its advantage. Both the union and integrated bar are occupationally homogeneous. Both groups elect representatives who are supposed to represent the entire group. Finally, both groups are comprised of members who often disagree on matters of public interest.

A distinction does arise, however, in the character of the entity to which the compelled funds must be paid. On one hand, Congress has recognized the importance of collective bargaining and the need for unions to avail themselves of the political process in the representation of their members. See *Hanson*, *supra* at 238, 76 S.Ct. at 721. In this respect, the union's need to undertake political activities is more of a necessary consequence of the collective bargaining system than an independent, compelling interest. On the other hand, the integrated Bar has been recognized by the State as possessing special training and experience with which to serve in an advisory function to the various branches of state government and to help "improve the administration of justice." While this advisory function is not the Bar's only function or even its most important function, the Bar's capacity and responsibility to advise and educate gives rise to a compelling governmental interest distinct from that of the labor union.

Justice Harlan, in his concurring opinion in *Lathrop v. Donahue*, *supra*, seized upon this distinction to support his contention that an integrated bar was conceptually no different than an appointed advisory board whose dissenting individual members would have no first amendment right to squelch such a board's majority recommendation. See *Lathrop*, 367 U.S. at 861, 81 S.Ct. at 1847. Because Florida has recognized the Bar as an arm of the judiciary, see *In re Amendment to the Integration Rule of the Florida Bar*, 439 So.2d 213, 214 (Fla.1983), this argument has some appeal. Justice Powell's concurrence in *Abood*, however, provides a more persuasive distinction between compelled support of government and a private group:

Compelled support of a private association is fundamentally different from compelled support of government. . . .

[T]he reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people. The same cannot be said of a union, which is representative only of one segment of the population, with certain common interests. The withholding of financial support is fully protected as speech in this context.

431 U.S. at 259, n. 13, 97 S.Ct. at 1811 n. 13. Under this analysis, the Bar's interests are closely aligned with those of a labor union, and its lobbying activities are more accurately viewed as partisan politics than the supposedly impartial recommendation of a governmental entity.

[1569] We conclude, therefore, that the difference between the union and the integrated bar is so small that the rationale of the *Abood* case is very appropriate. See *Keller v. State Bar of California*, 181 Cal.App.3d 471, 226 Cal.Rptr. 448 (3d App.Dist.1986). The similarities between union dues and integrated bar dues are so substantial that we may safely transpose the *Abood* holding to the facts presented in this appeal as follows: the Florida Bar may use compulsory Bar dues to finance its Legislative Program only to the extent that it assumes a

political or ideological position on matters that are germane to the Bar's stated purposes.

Obviously, the recitation of this simplistic rule will be of little assistance when one of the purposes of the Bar is the amorphous "administration of justice." Transposition of the *Abood* rationale to the integrated bar works well conceptually, but the practical reality of applying that rationale is not so easy. All first amendment challenges are analyzed under a two-part test that requires a "compelling interest" and the "least restrictive means" of achieving that interest. E.g., *Chicago Teachers Union v. Hudson*, 475 U.S. —, —, 106 S.Ct. 1066, 89 L.Ed.2d 232, 245 (1986). *Abood* did nothing more than identify a proper "compelling interest" for the first step of this analysis. *Abood* did not vitiate the "least restrictive means" criterion; the Court merely defined one exceptional circumstance when compelled fees may be used to advocate views inimical to the beliefs of some union members. Wooden application of the *Abood* rule could arguably extend unlimited discretion to the Bar under its administration-of-justice function.

Accordingly, it is apparent that too much weight was given at the trial level to the Bar's compelling interest argument and not enough attention was focused upon whether the Legislative Program was conducted in the least restrictive manner available to the Bar. The evidentiary record in this appeal does not enable us to make a definitive decision on whether certain positions taken by the Bar were sufficiently related to its basic function to justify the expenditure of compulsory dues. Nor does the opinion of the trial court adequately identify specific actions taken by the Bar's Legislative Program. Indeed, the decision below was based on a review of the Bar's Policy 900, rather than analysis of past Bar positions. In an action such as this, where specific actions are challenged as contrary to the first amendment, it is not sufficient to assess the rules and procedures by which those actions were taken. The proper focus in this action should be upon the actual results of the Bar's Legislative Program, i.e., whether past positions of the Bar were sufficiently related to its purpose of improving the administration of justice. On this issue,

the Bar bears the burden of proving that its expenditures were constitutionally justified. See *Chicago Teachers Union, supra*, at —, 106 S.Ct. at 1074, n. 11, 89 L.Ed.2d at 245, n. 11.

Although further findings of fact are necessary to resolve this dispute, some discussion of appropriate Bar lobbying issues is warranted. Uncertainty and disagreement over what is a proper issue for Bar lobbying are the reasons for this dispute and for our reversal of the trial court. In such a situation, some guidance is necessary to help draw the inevitably fine lines that will arise in these cases. The Bar should construe "improving the administration of justice" as pertaining to the role of the lawyer in the judicial system and in society. The collective expertise of lawyers is grounded in their long-standing relationship with the courts. Lobbying activities that infringe upon individual rights should relate directly to that expertise.⁴

It should be stressed that this opinion addresses only the use of compelled fees by [1570]the Bar. *Abood* specifically noted that the union was free to politicize on *any* issue of interest to that group. See 431 U.S. at 235, 97 S.Ct. at 1799. Only the use of compelled funds was prohibited for issues unrelated to collective bargaining. *Id.* Similarly, the Bar may speak as a group on any issue as long as it does so without using the compulsory dues of dissenting members.⁵

4. Acceptable areas for Bar lobbying would include the following topics: (1) questions concerning the regulation of attorneys; (2) budget appropriations for the judiciary and legal aid; (3) proposed changes in litigation procedures; (4) regulation of attorneys' client trust accounts; and (5) law school and Bar admission standards.

5. Although the question of proper remedy is not before this court, this aspect of the *Abood* opinion suggests that the difficult task of discerning proper Bar position issues could be avoided by one of two methods: (1) a voluntary program in which lawyers would not be compelled to finance the Legislative Program, but could contribute towards that program as they wished; or (2) a refund procedure allowing dissenting lawyers to notify the Bar that they dis-

[note continued]

IV.

This action is therefore REVERSED and REMANDED to the district court for further proceedings consistent with this opinion.

agree with a Bar position, then receive that portion of their dues allotted to lobbying. [According to testimony at trial, each lawyer's share of the lobbying budget amounts to approximately \$1.50]. Lawyers would only have to notify the Bar of a general disagreement, since the first amendment also protects an individual's right *not* to disclose his beliefs. See *Abood, supra*, at 241, n. 42, 97 S.Ct. at 1802, n. 42.

APPENDIX D

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
& FINAL DECLARATORY JUDGMENT
OF THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN
DISTRICT OF FLORIDA**

August 12, 1985

[Clerk's Stamp omitted in printing—Filed Aug. 12, 1985]

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

ROBERT E. GIBSON,

Plaintiff,

vs

CASE NO. TCA 84-7109-MMP

THE FLORIDA BAR, and the Members
of the BOARD OF GOVERNORS,

Defendants.

FINDINGS OF FACT & CONCLUSIONS OF LAW
&
FINAL DECLARATORY JUDGMENT

This action for declaratory and injunctive relief was filed pursuant to the provisions of §1 of the Civil Rights Act of 1971, 42 U.S.C. §1983, and the Declaratory Judgment Act, 28 U.S.C. §2201 et seq. Plaintiff Robert E. Gibson alleges a denial of his right to freedom of speech and association as guaranteed by the First and Fourteenth Amendments to the United States Constitution, which denial is occasioned by the defendant The Florida Bar's practice of engaging in political activity funded with compulsory dues paid by its membership. Jurisdiction is founded upon 28 U.S.C. §1331 and 28 U.S.C. §1343(3). The following shall constitute the Court's findings of fact and conclusions of law. Rule 52(a), Fed.R.Civ.P.

The Florida Bar ("BAR") is an integrated bar established by rule of the Supreme Court of Florida in accordance with Article V, Section 15 of the Florida Constitution. Under the Integration Rule, attorneys are required to be members of the

Bar in order to practice law in Florida, and that membership is conditioned upon the payment of compulsory dues on an annual basis. Integration Rule of The Florida Bar, Arts. 2, 8. These dues are set by the Bar's Board of Governors, and are presently limited to \$140 per annum. *Id.* Art. 8. Plaintiff is a member in good standing of the Bar and pays dues as an incident thereto.

Compulsory dues represent approximately 56.8 per cent of the Bar's income; these dues are commingled with revenue from other various sources. The Bar engages in lobbying activities before the Florida Legislature and takes public positions regarding legislative and constitutional issues; approximately 2.02 per cent of the Bar's total revenue is expended for such lobbying and public advocacy.

As guidelines for engaging in the above activities, the Bar has adopted Standing Board Policy 900, which states the Bar's general legislative policy as follows:

a) The purposes of The Florida Bar are set forth in the Integration Rule. Neither The Florida Bar nor any of its committees or sections may take a position on legislation either as a proponent or opponent unless it is determined by the Board of Governors that the legislation is related to the purposes of The Florida Bar as set forth in the Integration Rule.

b) The Bylaws of The Florida Bar set forth the restrictions on establishing a legislative policy. Article VI, Section 2 of the Bylaws provides that:

" . . . No legislative matter shall be recommended, approved, disapproved or endorsed by The Florida Bar unless such action is initiated by a written report and recommendation of a committee and approved by a majority vote of the active

members present at the [annual] meeting; or, legislative matters may be recommended, approved, disapproved, or endorsed on behalf of The Florida Bar at any time by two-thirds vote of the members of the Board of Governors present at the meeting, and during the time when the Legislature is in session the Executive Committee may act upon pending or proposed legislation.

The preamble of the Integration Rule states the purposes of the Bar as "[t]o inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence" To insure that a position taken by the Bar is related to these purposes, Standing Board Policy 900 establishes a procedure, in accordance with Article VI, Section 2 of the Bar's bylaws, through which such a determination must be made before a particular position may be adopted. Under this procedure, the Board of Governors may be called upon to adopt a particular legislative position in one of two ways: 1) a recommendation by the Bar's Legislation Committee, or 2) a motion by a member of the Board of Governors with regard to a matter previously considered by the Legislation Committee. With regard to a proposed legislative position, the Legislation Committee makes recommendations to the Board of Governors as to: 1) whether the proposed action is within the scope of the Bar's authority as set forth in the Integration Rule, and 2) what position (i.e., support, opposition, neutral) the Board should adopt.

As indicated above, consideration of a specific legislative position by the Board of Governors requires:

a) An affirmative vote of a majority of those present that the proposed legislative action is within the scope of the authority of the Florida Bar under the Integration Rule.

b) If the vote is affirmative, then a second vote will be taken to determine the specific legislative position to be adopted. Action to support, oppose or take a neutral position on the legislation shall require a two-thirds vote of the Board members present.

Standing Board Policy 900, §9.11(a)(5).

Under certain conditions when the Florida Legislature is in session, the Executive Committee may adopt specific legislative positions. To do so, however, the committee must first affirmatively establish by majority vote . . . that the legislation or legislative action being considered is on a subject matter falling within the purposes of The Florida Bar as set forth in the Integration Rule." *Id.*, §9.12(b)(2)(a). Interested persons are allowed to appear before the Legislation Committee, the Board of Governors, or the Executive Committee to express their views in support of or in opposition to legislative proposals under consideration.

The present litigation was precipitated by the Bar's taking a public stance in opposition to "Citizens' Choice on Government Revenue" ("Proposition One"), a proposed amendment to the Florida Constitution which would have limited the amount of revenue the state and other taxing entities could receive. Plaintiff Gibson personally supported Proposition One, and filed the instant complaint after the Bar publicly announced, through its president, its opposition to the measure. Subsequently the Florida Supreme Court Struck Proposition One from the 1984 general election ballot "for failure to comply with the single-subject requirement of Article XI, section 3 of the Florida Constitution". *Fine v Firestone*, 448 So.2d 984, 993 (Fla. 1984).

The controversy continues, however, as plaintiff urges that the Bar may not constitutionally expend any portion of the compulsory dues of its membership for the purpose of advocating "any position on any matter other than direct advocacy to a

judicial body". The Bar has, as demonstrated by Standing Board Policy 900, an ongoing program to advocate its positions to the legislature and the public, and argues that it may constitutionally use compulsory dues to do so "provided that the subject matter is reasonably connected with the Bar's purposes as stated in the Integration Rule".

Freedom of Association is a right which is protected under the First and Fourteenth Amendments to the United States Constitution. *Elrod v Burns*, 427 U.S. 327, 355-57, 96 S.Ct. 2673, 2680-82, 49 L.Ed.2d 547 (1976) (plurality opinion); *NAACP v Alabama ex rel. Patterson*, 357 U.S. 449, 460, 78 S.Ct. 1163, 1170, 2 L.Ed.2d 1488 (1958). This right is not absolute, however; a state may intrude into an individual's freedom of association to the extent the intrusion is justified by a compelling state interest. *Buckley v Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976); *United States v O'Brien*, 391 U.S. 367, 376.77, 88 S.Ct. 1673, 1678-79, 20 L.Ed.2d 672 (1968).

In *Lathrop v Donohue*, 367 U.S. 820, 81 S.Ct. 1826, 6 L.Ed.2d 1191 (1960) (plurality opinion), the Supreme Court held that a state could constitutionally compel membership in an integrated bar association and the payment of annual dues as an incident to that membership. The Court specifically reserved, however, the question whether a member of that body might "constitutionally be compelled to contribute his financial support to political activities which he opposes". *Id.* at 847-48; 81 S.Ct. at 1840.

The question thus reserved was later addressed, in the context of labor union lobbying activities, in *Abood v Detroit Board of Education*, 433 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1976). In *Abood*, the Court distinguished union funds spent for lobbying with regard to "ideological activities unrelated to collective bargaining activities" from those spent for collective bargaining activities, holding that for the union to compel contributions for such lobbying activities impermissibly intruded on plaintiffs' First Amendment rights. Compelled contributions could be spent, however, in furtherance of the union's duties as

collective bargaining representatives; this intrusion of the plaintiffs' rights was found justified by the important governmental interest in peaceful labor relations:

To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests. An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. But the judgment clearly made in [Railway Employees' Dept. v Hanson, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112] and [Machinists v Street, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141] is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress. "The furtherance of the common cause leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy. If that were allowed, we would be reversing the Hanson case, sub silentio."

Abood, 431 U.S. at 222-23, 97 S.Ct. at 1793 (footnote and citation omitted).

The Bar argues and the Court agrees, that Abood thus stands for the proposition that the State may intrude upon plaintiff's First Amendment rights where the intrusion is justified by a sufficiently important state interest, and so long as the

intrusion is "closely drawn". See Buckley v Valeo, *supra*, 424 U.S. at 24, 96 S.Ct. at 638; Falk v State Bar of Michigan, 343 N.W.2d 504, 514 (Mich. 1983). It can scarcely be doubted that the improvement of the administration of justice and the advancement of the science of jurisprudence are "sufficiently important" state interests to justify the degree of intrusion into plaintiff's rights occasioned by the Bar's legislative program.

The procedures adopted by the Bar in Standing Board Policy 900 are sufficient to insure that positions adopted by the Board are reasonably related to these important state interests. This determination is made, by necessity, from a review of the policy itself rather than an independent assessment of past positions. The Court is neither equipped nor inclined to undertake such a review; further, there is insufficient evidence in the record from which to adequately analyze the identified positions taken during the last few years. Indeed, to do so would be merely to substitute the Court's judgment for that of the Board of Governors.

Plaintiff does not suggest that the Bar has adopted positions without following its identified procedural safeguards. Further, neither he nor any identified party has been denied the opportunity to address the Board of Governors, the Legislation Committee, or the Executive Committee with regard to his views concerning any proposed position. Nor has he been deprived of his right to voice his personal views in any other manner, regardless of their content.

In sum, the Court concludes that The Florida Bar may exact dues from its membership to support those duties and functions which serve the important governmental interests established as its purposes by the Integration Rule. To the extent these interests are furthered, and within the guidelines set forth by Standing Board Policy 900, the Bar may constitutionally advocate its positions on legislative and constitutional issues.

Accordingly, it is ORDERED:

1. Request for Injunctive Relief is DENIED.
2. The foregoing is issued as a Final Declaratory Judgment.
3. Costs awarded to defendant upon proper motion.

DONE AND ORDERED this 12th day of August, 1985.

/s/ Maurice M Paul
United States District Judge

APPENDIX E

ORDER OF THE UNITED STATES
COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
DENYING REHEARING

October 5, 1990

[Clerk's Stamp omitted in printing—Filed Oct. 5, 1990]

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-3388

ROBERT E. GIBSON,

Plaintiff-Appellant,

versus

THE FLORIDA BAR and
MEMBERS OF THE BOARD OF GOVERNORS,

Defendants-Appellees.

On Appeal from the United States District Court for the
Northern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S)
OF REHEARING EN BANC

(Opinion JULY 23, 1990, 11th Cir., 198 __, __ F.2d __).
()

Before: TJOFLAT, Chief Judge, ANDERSON and CLARK,
Circuit Judges.

PER CURIAM:

(√) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

() The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

() A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Gerald B. Tjoflat
UNITED STATES CIRCUIT JUDGE